AIMB Marketing Sdn Bhd & Ors v Malaysian Trustees Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–749 OF 2007
TENGKU BAHARUDIN SHAH, WAN ADNAN MUHAMAD AND AZHAR MA'AH JJCA
15 JUNE 2010

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Trusts and Trustees — Trusts — Existence of — Appellants sold goods on consignment to supermarket — Whether proceeds from sale of goods were held on trust for appellants — Whether relationship between parties fiduciary or showed intention to create trust — Whether sale proceeds kept in separate account or mixed with other monies

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PHK was a supermarket and departmental store chain to whom the appellants supplied goods on consignment for sale to the public. PHK had issued various commercial papers to the value of RM120m which were held by an investment bank. To secure the papers, PHK executed a debenture over its assets in favour of the first respondent which was the security trustee for the bank. PHK was subsequently wound up by order of court and liquidators were appointed. In the course of the liquidation, the liquidators recovered about RM1.6m of PHK's monies ('the stake monies'). It was also discovered that PHK had RM107,659.52 in an account ('the account monies') with HSBC Bank (M) Bhd to which sum the bank claimed a set-off of RM18,877.39 for the loss of 20 units of Credit Authorisation Terminals supplied to PHK. The first respondent, as the debenture holder and secured creditor, appointed receivers and managers over PHK's assets. The receivers and managers laid claim to both the stake monies and the account monies (jointly called 'the subject monies') as assets captured by the debenture charge. The first respondent later took over from the receivers and managers as claimants to the subject monies. The appellants also claimed the subject monies. They said that as they had not been paid by PHK for goods supplied to it on consignment, the proceeds of sale of those goods formed part of the subject monies and PHK held the sale proceeds on trust in their favour. In view of the competing claims to the subject monies by the first respondent, the appellants and HSBC, interpleader proceedings were instituted both by the liquidators and HSBC. The High Court held the first respondent was entitled to the subject monies and ordered the liquidators and HSBC to pay the same over to the first respondent. The decision was appealed to the Court of Appeal.

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Held, dismissing the appeal and affirming the decision of the High Court:

(1) No trust existed in the present case. The relationship that existed between

the appellants and PHK emanated from ordinary on-going trading activities. They were business arrangements following the signing of consignment agreements. The proceeds of sale of the goods did not arise from an isolated transaction (see paras 15 & 21).

(2) The consignment agreements between the appellants and PHK did not provide for the sale proceeds to be kept in separate accounts nor was PHK prohibited from mixing the proceeds with other monies. No trust, in fact and in law, could be imputed to a specific sum as represented by the subject monies as any alleged trust monies would have been spent or dissipated and would no longer be part of the subject monies (see para 16).

(3) The rights of the first respondent to all the subject monies as secured creditor prevailed over HSBC which was just another unsecured creditor in relation to PHK's assets. Section 41 of the Bankruptcy Act 1967 could not be applied to entitle HSBC to retain the amount of RM18,877.39. In any event, HSBC failed to show details of the alleged loss of Credit Authorisation Terminals (see paras 19–20).

[Bahasa Malaysia summary

PHK merupakan sebuah pasaraya dan rangkaian pusat membeli-belah ke mana perayu-perayu membekalkan barangan atas konsainan untuk jualan kepada umum. PHK mengeluarkan berbagai suratan komersial bernilai RM120 juta yang disimpan oleh bank pelaburan. Untuk menjamin suratan tersebut, PHK menandatangani satu debentur atas aset-asetnya memihak kepada responden pertama yang merupakan pemegang amanah jaminan untuk bank. PHK kemudian digulungkan oleh perintah mahkamah dan pelikuidasi dilantik. Semasa proses likuidasi, pelikuidasi memperoleh lebih kurang RM1.6 juta wang PHK ('wang amanah'). Juga diketahui bahawa PHK mempunyai RM107.659.52 di dalam akaun ('wang akaun') dengan HSBC Bank (M) Bhd terhadap jumlah yang mana bank menuntut set-off sejumlah 18,877.39 untuk kerugian 20 unit *Credit Authorisation Terminal* yang dibekalkan kepada PHK. Responden pertama, sebagai pemegang debentur dan penghutang yang dijamin, melantik penerima dan pengurus terhadap aset-aset PHK. Penerima dan pengurus dilantik membuat tuntutan terhadap kedua-dua wang amanah dan wang akaun ('bersama dinamakan wang perkara tersebut') sebagai aset yang dianggap sebagai caj debentur. Responden kedua kemudian mengambil alih daripada penerima dan pengurus dilantik sebagai penuntut wang perkara tersebut. Penuntut-penuntut juga menuntut wang perkara tersebut. Mereka menyatakan bahawa oleh sebab mereka tidak dibayar oleh PHK untuk barangan yang dibekalkan atas konsainan, hasil jualan barangan tersebut membentuk sebahagian wang perkara tersebut dan PHK memegang hasil jualan tersebut sebagai amanah bagi pihak mereka. Disebabkan oleh tuntutan yang bertentangan terhadap wang perkara tersebut oleh responden, perayu-perayu dan HSBC, prosiding interplider dimulakan

oleh pelikuidasi dan HSBC. Mahkamah Tinggi memutuskan bahawa responden pertama berhak kepada wang perkara tersebut dan memerintahkan pelikuidasi dan HSBC untuk membayarnya kepada responden pertama. Keputusan tersebut dirayu ke Mahkamah Rayuan.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Tidak ada amanah yang wujud di dalam kes ini. Hubungan yang wujud di antara perayu-perayu dan PHK bermula daripada aktiviti perniagaan biasa yang berterusan. Ia adalah aturan perniagaan berikutan pemeteraian perjanjian konsainan. Hasil jualan barangan tersebut tidak timbul daripada transaksi yang berasingan (lihat perenggan 15 & 21).

(2) Perjanjian konsainan di antara perayu dan PHK tidak memperuntukkan hasil jualan disimpan dalam akaun yang berasingan dan PHK tidak dihalang daripada mencampurkan hasil tersebut dengan wang yang lain. Tidak ada amanah, dari segi fakta dan undang-undang, boleh diletakkan kepada jumlah spesifik seperti yang dirujuk oleh wang perkara tersebut kerana apa-apa wang amanah mungkin telah dibelanjakan atau dilesapkan atau tidak lagi menjadi sebahagian wang perkara tersebut (lihat perenggan 16).

(3) Hak-hak responden pertama kepada kesemua wang perkara tersebut sebagai penghutang yang dijamin mengatasi HSBC yang adalah satu lagi penghutang tanpa jaminan dalam kaitan aset-aset PHK. Seksyen 41 Akta Kebankrapan 1967 tidak boleh diaplikasikan untuk membenarkan HSBC mengekalkan jumlah RM18,877.39. Walau bagaimanapun, HSBC telah gagal menunjukkan butir-butir kerugian *Credit Authorisation Terminals* yang didakwa (lihat perenggan 19–20).]

Notes

For cases on existence of goods in general, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2601–2604.

Cases referred to

Hinckley Singapore Trading Pte Ltd v Sogo Department Store(s) Pte Ltd [2001] 4 SLR 154, CA (refd)

Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Co & Ors [1989] 1 MLJ 284, HC (refd)

Bond Worth Ltd, Re [1979] 3 WLR 629 (refd)

Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding industries Sdn Bhd (in liquidation) [1998] 4 MLJ 569, FC (folld)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)

Walker v Corboy (1990) 19 NSWLR 382 (folld)

Legislation referred to

Bankruptcy Act 1967 s 41,

KL Wong (Wong Kam Leong & Partners) for the first to fourth, sixth to 17th, 19th, 21st to 24th and 26th appellants.
Amir Mohd Salleh (Kadir Andri & Partners) for the fifth, 18th, 20th and 25th appellants.
(Shook Lin & Bok) for the first respondent.
Robert Low (David Cheong with him (Ranjit Ooi & Robert Low) for the second respondent.

Azhar Ma'ah JCA (delivering judgment of the court):

[1] This is an appeal against the decision of the High Court dated 1 August 2007 which had found in favour of the first respondent interpleader proceedings concerning competing claims by the appellants and the first respondent. The background facts of this case are these.

[2] Pasaraya Hiong Kiong Sdn Bhd ('PHK') was a supermarket and departmental store chain. The appellant supplied goods on consignment to the PHK for sale to the public. Consignment agreements were entered into between the PHK and each of the appellants.

[3] PHK had issued various commercial papers of RM120m ('the notes') which were held by Affin Investment Bank Bhd ('AIBB'). To secure the notes, PHK executed, inter alia, a debenture in favour of the first respondent who is the Security Trustee for AIBB.

[4] On 2 March 2005, PHK was ordered to be wound up and liquidators were appointed. They were Ong Kong Lai and Wong Cham Mew (the second respondent). In the course of the liquidation the liquidators had recovered a total of RM1,557,916.49 of PHK's monies ('the stake monies').

[5] On 23 November 2005, receivers and managers were appointed by the first respondent over PHK's assets pursuant to the debenture. The receivers and managers requested the liquidators to hand over to them PHK's movable assets, including the stake monies, as assets captured by the debenture charge. At the same time the appellant also notified the liquidators of their claims to the stake monies, allegedly due to them as various suppliers of goods. It was alleged that the stake monies were held on trust by PHK for each of the appellants. As there were competing claims by the receivers and managers and the appellants over the stake monies, the liquidators instituted interpleader proceedings. At the same time there was also evidence that PHK had an account with HSBC Bank Malaysia Bhd ('HSBC') and the latter was holding RM107,659.52 PHK's

monies in the said account (the account monies). The appellants and the receivers and managers have also claimed for the account monies. In addition to that HSBC too wanted a set-off against the account monies. Accordingly, HSBC too instituted interpleader proceedings. During this course of the interpleader proceedings the first respondent, as the debenture holder and secured creditor over the assets of PHK took over from the receivers and managers as claimant to the stake monies and the account monies (the subject monies). The first respondent was, by order of the court dated 15 March 2007, made a party in these two interpleader proceedings. Thus, there were three parties that claimed the subject monies ie (i) the first respondent, as debenture holder, (ii) the appellants, as alleged suppliers of goods to PHK, and (iii) HSBC to part of the account monies held by itself.

[6] The High Court on 1 August 2007 decided that the first respondent was entitled to the subject monies and directed the liquidators and HSBC to pay the same to the first respondent. Hence this appeal.

[7] On the factual matrix of the case it is not disputed that the first respondent is a debenture holder, having a charge over the assets of PHK. In this respect, this will include the stake monies as well as the account monies. In short, the first respondent is a secured creditor as far as PHK's assets are concerned.

[8] As for the appellants, basically, their claims are based on their respective consignment agreements for supply of goods to PHK. The appellants asserted that goods were supplied to PHK, and that the goods were sold by PHK and PHK did not pay them. In the circumstances, the appellants contended that the proceeds of sale of these goods formed part of the subject monies, and, as such a trust exists in relation to these sale proceeds. With regard to this contention, the learned High Court judge, in his assessment of the evidence before him had these to say.

> 25 To support their claims that the Disputed Monies are monies held on trust for them, they have to show to this Court the followings:
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> (a) that each of them has a consignment agreement for supply of goods to PHK;
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> (b) that goods were supplied to PHK,
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> (c) that the goods were sold by PHK and PHK did not pay them;
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> (d) that the proceeds of the sale of these specific goods formed part of the Disputed Monies; and
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> (e) that a trust exists in relation to these sale proceeds.
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> 26 It is glaringly obvious that very little or no evidence has been shown by the 3rd

- 29th defendants to support their claims. Except for the 6th, 12th, 13th, 15th and 17th defendants whose consignment agreements are exhibited in enclosure 3 and enclosure 6, the rest of the defendants have shown nothing to justify their claims.

27 On these 6th, 12th, 13th, 15th and 17th defendants, other than their alleged consignment agreements, none of the aforesaid requirements (b) to (e) of paragraph 25 above were shown.

28 Since the allegation of trust was made by them, by virtue of Sections 101, 102 and 103of the Evidence Act, 1950, the burden of proof lies on them to produce some fact or documentary evidence with regard to the particulars set out in the requirement above and the existence of the alleged trust.

[9] For the above findings the learned judge found support in *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697 (HC), wherein it was inter alia decided that the ordinary rules relating to burden of proof apply to interpleader issues as to other proceedings. The onus of proof rest on the claimant to show that he has a title to the goods and such onus can only be satisfied by proof of actual title in himself.

[10] The learned judge also found support to his findings in the decision of Singapore High Court in the case of *Kay Hian & Co (Pte) v Jon Phua Ooi Yong & Co & Ors* [1989] 1 MLJ 284 (HC). In that case, in an interpleader proceeding, a rival claim arose between a prior chargee under a debenture and a subsequent chargee over the ownership of shares initially owned by the second defendant therein, which had gone into receivership. The court held that whoever makes an assertion must prove it. As such, the receivers and managers only needed to produce the debenture which gives the debenture holders a charge. The burden of proof was thus on the subsequent chargee who is asserting a prior encumbrance in respect of the said shares.

[11] Apparently, taking cue from the above authorities the learned judge came to a finding that the appellants' assertion that the subject monies were trust monies were inadequately supported by evidence. The learned judge was of the view that the appellants had not established any existence of a trust and/or fiduciary relationship between themselves and PHK nor that the subject monies were trust monies held on their behalf.

[12] In respect of appellants sixth, 12th, 13th, 15th and 17th claims that the learned judge in his grounds of judgment had these to say.

32. Even if these creditors had indeed delivered goods to PHK (for which no particulars are given or shown that they were so delivered), the Court is of the view that the legal title to the said goods would have passed to PHK.

33. In the present case, except for the alleged consignment agreements of the 13th, 15th and 17th defendants, there is no retention of title clause found in the 6th and 12th defendants' alleged consignment agreements with PHK. Thus, clearly for the 6 and 12 defendants' legal title to the goods would have passed to PHK.

34. If legal title had passed to PHK, then these creditors cannot claim the goods as trust goods, as the title of the goods are no longer with them but with PHK. In such instance, all that the creditors have is an unsecured debts due from PHK for goods sold and delivered. These debts would have to be proven in liquidation and these creditors would then rank merely as unsecured creditors. MTB as debenture holder, therefore, has priority to the disputed monies as secured creditors.

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36. In relation to the 13th, 15th and 17th defendants, it was provided in their respective alleged consignment agreements with PHK that the title to the goods consigned to PHK remain in them until such time as the said goods have been sold and delivered to purchasers thereof.

37. Thus, if the 13th, 15th and 17th defendants' titles to their respective goods are relinquished when the said goods are sold and delivered to purchasers, they would no longer have any interest in the sold goods which would justify the creation of a trust over the sale proceeds of these goods in their favour.

38. In addition, it was clear from the respective alleged consignment agreements that PHK was entitled to deduct from the sale proceeds, inter alia, rental before remitting the same to the 13th, 15th and 17th defendants. Based on this, it cannot be alleged that all the sale proceeds of the goods would belong to the 13th, 15th and 17th defendants and that these be kept in trust for them.

39. In, any event, these three (3) unsecured creditors (the 13th, 15th and 17th defendants) also fail in their claims for the following reasons:

(a) they have failed to establish the other facts or particulars necessary to succeed in their claims to the disputed monies, as outlined in paragraph 25 above, and

(b) the mere fact of the retention of title clause does not give them any better rights than that of unsecured creditors as compared to MTB's right as secured creditor with a charge over the disputed monies.

[13] In amplification of the above findings our attention was drawn to a Singapore Court of Appeal case, *Hinckley Singapore Trading Pte Ltd v Sogo Department Store(s) Pte Ltd* [2001] 4 SLR 154 (CA), which on the facts are very similar to our present case. It was held in that case, that in the absence of an express term creating a trust, the maintenance of a separate account by the agent is crucial to constituting the money as trust money. There would be no trust if there was no obligation to keep sales money separate from company's own monies.

[14] Reference was also made to a decision in *Re Bond Worth Ltd* [1979] 3 WLR 629. The principle laid down in that case is that, where an alleged trustee

has a right to mix tangible assets or monies with his own other monies, this is incompatible with the existence of a subsisting fiduciary relationship in regard to such monies.

[15] On the factual matrix of this present case, we are of the view that the relationship that existed between the appellants and PHK emanated from ordinary ongoing trading activities. They were business arrangements following the signing of the consignment agreements. We would be more ready to hold the proceeds of the sale of the goods delivered to PHK as trust monies if they arose from isolated transaction.

[16] Following the decision of *Walker v Corbov* (1990) 19 NSWLR 382, we are indeed reluctant to introduce trust into commercial transactions. Furthermore, in our case it is noted that the consignment agreements did not provide that the sale proceeds were to be kept in separate accounts or that PHK was prohibited from mixing the funds with other monies. In the circumstances, no trust can, in fact, and in law be imputed to a specific sum as represented by the subject monies as the alleged trust monies would have been spent or dissipated and would no longer be part of the subject monies.

HSBC'S CLAIM

[17] HSBC Bank has requested the court to determine who should be entitled to the sum of RM107,659.52 that was being held by HSBC in a separate account. In addition, HSBC in its application also claimed for the sum of RM18,877.39 currently held by them as loss and expenses incurred as a result of the loss of 20 units of credit authorisation terminals supplied to PHK. For the sum of RM107,659.52 held by HSBC the learned judge held that the first respondent, as the secured creditor by virtue of the debenture is entitled to this sum. For the same reason that we have earlier stated we agree with him and thus affirm the finding.

[18] As for the sum of RM18,877.38, HSBC made its claim under s 41 of the Bankruptcy Act 1967, which reads as follows:

> Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person providing or claiming to prove a debt under such order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account and no more shall be claimed or paid on either side respectively.

[19] The learned judge had disallowed HSBC claim for a set-off. We have no reason to disagree with him, in view of the fact that the entire monies in the suspense account had already been charged to the first respondent. It is observed that the learned judge had also made a finding of facts that HSBC had failed to show details of the alleged loss of Credit Authorisation Terminals. Support for this was found in the Federal Court decision in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569 (FC). In that case, the court inter alia held that, 'For the statutory set-off provisions to apply, the circumstances of a case must disclose mutual credits, mutual debts or other mutual dealings. The prerequisite of mutual dealings requires that the cross-demands must be between the same parties, and be held in the same capacity or right'.

[20] The total effect of the abovementioned principle to our present case is that s 41 of the Bankruptcy Act 1967, cannot be applied here to entitle HSBC to retain the amount of RM18,877.39, and thus such amount should be paid to the first respondent together with the monies held in the suspense account. The rights of the first respondent to all the subject monies as secured creditor must, therefore, prevail over HSBC who is just another unsecured creditor in relation to the assets of PHK.

CONCLUSION

[21] In summary the cumulative effects of the circumstances which we have mentioned above, to our mind suggest strongly that no trust existed in the present case. We, therefore, dismissed the appeal and affirmed the decision of the learned judge.

Appeal dismissed and decision of the High Court affirmed.

Reported by Ashok Kumar